85-594

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

DEAN A. and BARBARA J. ROSTAD,
Respondents,

vs.

ON-DECK, INC., a New Jersey corporation,
Petitioner,

and

GARY GUY WILLEY, and GENERAL SPORTCRAFT, INC., a corporation,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court's exercise of personal jurisdiction over a small foreign corporation (3 to 5 employees) violates the Due Process clause of the Fourteenth Amendment in a product liability action where the foreign corporation had no direct contacts with the forum and where there is no evidence that the product reached the forum in the stream of commerce.

2. Whether a state court's exercise of personal jurisdiction over a small foreign corporation that is based upon the forum's interest in the litigation and the convenience of the plaintiffs violates the Due Process clause of the Fourteenth Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

II. OPINION BELOW

The Supreme Court of the State of Minnesota filed its Opinion on August 16, 1985. It has not yet been reported. A copy of that Opinion is located in the Appendix at A-1.

The Opinion of August 16, 1985 affirmed an Opinion of the Minnesota Court of Appeals filed on September 4, 1984. That Opinion has been reported at *Rostad v. On-Deck, Inc.*, 354

N.W.2d 95 (Minn.App. 1984), and appears in the Appendix at A-11.

The Minnesota Court of Appeals Opinion of September 4, 1984 reversed a Judgment entered in the Fourth Judicial District Court, County of Hennepin, State of Minnesota entered pursuant to an Order and Memorandum of the trial court dated December 22, 1983. The trial court dismissed On-Deck, Inc. for lack of personal jurisdiction. That Opinion is not reported. A copy of it appears in the Appendix at A-20.

III. GROUNDS UPON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3) and Rule 17(1)(b) and (c) of the Rules of the Supreme Court of the United States. This petition is timely filed within the 90-day period provided in 28 U.S.C. 2101(c).

The date of the Opinion of the Supreme Court of Minnesota was August 16, 1985.

IV. CONSTITUTIONAL CLAUSE INVOLVED

The questions presented in this Petition for Writ of Certiorari involve the Due Process clause of the Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT OF THE CASE

A. Facts Of The Incident.

In May 1978, Defendant Gary Guy Willey *found* a bat weight in a ballfield in St. Louis Park, Minnesota. A bat weight is a product used to assist baseball players in warming up before batting. There is no evidence as to where the bat weight was purchased, who purchased it, or how it came to Minnesota. *The bat weight was merely fortuitously found in a field in Minnesota.* No product packaging was found with the bat weight.

After finding the bat weight, Mr. Willey allowed his teammates on the Golden Leaf Bar Softball team to use it during the 1978 softball season. The bat weight was designed for use on baseball bats, and not softball bats.

On August 6, 1978 respondent Dean A. Rostad was the umpire in a softball game between Mr. Willey's team and another team. It is alleged that during the course of the game, the bat weight released from a bat and struck Mr. Rostad.

For purposes of this appeal only, On-Deck, Inc. admits that it manufactured the bat weight.

B. Facts Regarding Personal Jurisdiction.

On-Deck, Inc. ("On-Deck") is a New Jersey corporation with its only office in Westwood, New Jersey. On-Deck has always been a small, closely held corporation with between three and five employees. It has never had a direct contact with the State of Minnesota. On-Deck has never owned, leased or possessed property in Minnesota; has never had an office, sales outlet or place of business in Minnesota; has never been licensed to do business in Minnesota; has never had an agent for service of process in Minnesota; has never had a mailing

address or telephone listing in Minnesota; has never solicited business in Minnesota; has never advertised in Minnesota; has never sold any products in Minnesota; has never had a bank account in Minnesota; and has never entered into a contract with a Minnesota resident. (See Affidavit of Frank Hamilton, Appendix at A-23). On-Deck has never had a direct contact with Minnesota.

Between 1968 and 1973, On-Deck sold bat weights to General Sportcraft, a distributor of general sporting goods items and a separate and distinct corporate entity. Since 1973, On-Deck sold bat weights to other distributors.[1] On-Deck was never a party to, nor involved with, any subsequent sales or promotions by General Sportcraft. On-Deck never made any sales in Minnesota, and was never aware of the specific states into which bat weights were distributed.

Respondents allege that General Sportcraft distributed bat weights into Minnesota. However, Respondents do not allege that the bat weight at issue in this case was distributed into Minnesota. *Respondents do not claim that the subject product reached Minnesota in the stream of commerce.* The subject product was, by random chance, found in a field in Minnesota.

C. Stages In Proceedings At Which Federal Questions Were Raised.

On April 11, 1980, Respondents commenced this action in the Fourth Judicial District Court, County of Hennepin, State of Minnesota against On-Deck. On April 24, 1980, On-Deck served its answer, setting up lack of personal jurisdiction as its second affirmative defense. General Sportcraft, the alleged distributor, has also been joined as a party defendant.

---

[1] Any sales after 1973 are irrelevant since Respondents claim that the subject bat weight was manufactured before 1973.

On December 9, 1983, On-Deck moved the trial court for an order dismissing the complaint on the ground that an exercise of personal jurisdiction would violate the Due Process clause of the Fourteenth Amendment to the United States Constitution. On-Deck argued that the Due Process clause as interpreted by the Supreme Court of the United States prohibited an exercise of jurisdiction.

On December 22, 1983, the trial court granted On-Deck's motion, dismissed the complaint for lack of personal jurisdiction and ordered judgment in favor of On-Deck. The trial court based its ruling upon the federality concepts of the United States Constitution and the Due Process clause.

Respondents prosecuted an appeal to the Minnesota Court of Appeals. On-Deck argued that an exercise of jurisdiction by Minnesota courts would violate the Due Process clause of the United States Constitution. The Minnesota Court of Appeals rendered its Opinion on August 28, 1984 which reversed the trial court's order and ruled that an exercise of jurisdiction would not violate the Due Process clause.

On-Deck petitioned the Supreme Court of Minnesota for Review of the Opinion of the Minnesota Court of Appeals, arguing that the Due Process clause of the United States Constitution would be violated if jurisdiction were exercised. The Petition for Review was granted by the Supreme Court of Minnesota on February 5, 1985, which rendered its Opinion on August 16, 1985; ruling that the Due Process clause would not be violated.

VI. ARGUMENT FOR GRANTING THE WRIT

1. The Opinion Of The Supreme Court Of Minnesota Conflicts With Opinions Of Federal Courts Of Appeal.

The Supreme Court of Minnesota held that a product manufacturer is subject to jurisdiction in a state in which products it makes are found by utilizing a "stream of commerce" theory, *despite the fact that there is no evidence the product reached the state in the stream of commerce and despite the fact that the manufacturer has no contacts whatsoever with the state.* This holding is in direct conflict with the case of *Humble v. Toyota Motor Co. Ltd.*, 727 F.2d 709 (8th Cir. 1984). There, a foreign corporation manufactured automobile seats which were sold to Toyota Motors in Japan. The automobiles were sold in California by Toyota and distributed throughout the United States. The plaintiff was injured by defects in the car seats after purchasing a car in Iowa. The manufacturer had no direct contacts with Iowa, and had no offices, bank accounts, telephone listings, or mailing addresses there. All distribution and marketing was by Toyota. The court, relying on *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980), held there was no personal jurisdiction over the seat manufacturer in Iowa. Although the manufacturer may have foreseen that its products may be sold in Iowa, it could not reasonably anticipate this since it did not purposefully conduct any activities in the state.

The Opinion of the Supreme Court of Minnesota is also in direct conflict with *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984). There, plaintiff was injured by a drug manufactured by defendant. Plaintiff attempted to gain jurisdiction over the manufacturer in New Hampshire. The defendant ran advertisements in trade journals in New Hampshire, and

had eight employees working there with three of the employees living in the state. The manufacturer made no direct sales in New Hampshire. It sold products to wholesale distributors, some of which were located in New Hampshire. The court found no jurisdiction over the manufacturer. Although it had contacts with the forum, the court found those contacts unrelated to plaintiff's cause of action in that none of the New Hampshire sales could be tied to the product which caused plaintiff's injury. The court found that "a consideration of fundamental importance is whether the cause of action arises out of or is related to the defendant's contacts with the forum state." 774 F.2d at 215, citing *Keeton v. Hustler Magazine, Inc.*, 204 S.Ct. 1473 (1984). In the case at bar, Respondents' claim did not arise out of On-Deck's alleged contacts, since none of the Minnesota sales of products by others can be tied to the product allegedly causing Respondents' injuries.

The Opinion of the Supreme Court of Minnesota conflicts with the case of *Hutson v. Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert. denied* 439 U.S. 983 (1978). There, an Italian corporation sold a defective chain to another corporation having the exclusive right to sell the product throughout North America. The chain was ultimately distributed to a retailer in Arkansas who sold it to the plaintiff's employer. Plaintiff was injured by the defective chain. The court found no jurisdiction over the corporation since the connection it had "consist[ed] only of the fortuitous introduction of [its] products into the forum state through the decision of the [distributor]" and that it "did not consciously solicit or purposefully avail itself of the privilege to conduct business in the forum state as *Hanson* requires for the exercise of personal jurisdiction." 584 F.2d at 837.

2. The Opinion Of The Supreme Court Of Minnesota Conflicts With Decisions Of The Supreme Court Of The United States.

The Supreme Court of Minnesota held that personal jurisdiction can be exercised over a foreign corporation under a stream of commerce theory when it cannot be shown that the product arrived in the state in the stream of commerce, and based jurisdiction solely on the fact that *other* products were distributed into the forum by independent distributors *after* this product was manufactured. This holding conflicts with *International Shoe Company v. Washington*, 326 U.S. 310 (1945). There, the Supreme Court of the United States held:

> " 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous or systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." 326 U.S. at 317 (citations omitted).

Accordingly, if the cause of action does not arise from the contacts of the foreign corporation, there is no jurisdiction unless the corporation has conducted continuous and systematic activities directly in the forum. In the case at bar, the cause of action did not arise from On-Deck's activities in the forum. Since the subject product was merely found in a field and did not arrive in the state in the stream of commerce or through distribution of the product, the distribution of other

products by other independent corporations is irrelevant for jurisdiction purposes under the *International Shoe* precept. The fact that other products may have come to Minnesota in a marketing network is irrelevant since the cause of action did not arise from those products. The cause of action arose from a product that did not arrive in Minnesota in a marketing network. Accordingly, under *International Shoe*, there is no jurisdiction unless the corporation conducts systematic and continuous business directly in the state. Such facts do not exist here. For the same reasons, the holding of the court below conflicts with the case of *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868 (1984). Again, this Court held that contacts consisting of the entry of an agent into the forum, the purchase of four million dollars of products in the forum, numerous visits to the forum by employees for training, and receipt of five million dollars of payments from the forum were insufficient for personal jurisdiction since the cause of action did not arise out of the contacts. Here, as there, Respondents' cause of action did not arise out of On-Deck's supposed indirect contacts.

The Opinion of the Supreme Court of Minnesota is in conflict with the case of *Hanson v. Denkla*, 357 U.S. 235 (1958). The United States Supreme Court, noting that the cause of action did not arise from the contacts allegedly supporting jurisdiction held:

> "[I]t is essential in each case that there be some activity by which the defendant purposefully avails itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

This holding is contrary to the Opinion of the Minnesota Supreme Court. (A-1) The public policy underlying the Re-

spondents' stream of commerce theory is that a defendant "purposefully avails" itself of a forum by creating a distribution network causing products to reach the state. Here, however, the distribution network did not cause the product to reach the forum; *the product was found in a field with no evidence it arrived in the stream of commerce.* Therefore, On-Deck has not purposefully availed itself of the Minnesota forum and has conducted no activities in the forum.

The Opinion of the Supreme Court of Minnesota conflicts with the case of *Shaffer v. Heitner*, 433 U.S. 186 (1977), which held that no jurisdiction can be constitutionally exercised where the cause of action does not arise out of the defendant's contacts. *See*, 433 U.S. at 213. As noted above, Respondents' cause of action does not arise out of any product reaching Minnesota in the stream of commerce. Accordingly, jurisdiction cannot be exercised consistent with the Due Process clause.

The Opinion of the Supreme Court of Minnesota is in conflict with the cases of *Rush v. Savchuk*, 444 U.S. 320 (1980) and *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980). In those cases, it was held that in determining whether an exercise of personal jurisdiction is consistent with due process, "the inquiry must focus upon the relationship among the defendant, the forum and the litigation." *Rush v. Savchuk*, 444 U.S. at 327; *see also, Shaffer v. Heitner, supra*, 433 U.S. at 204. The *Rush* and *Worldwide Volkswagen* cases further held that the plaintiff's contacts with the forum are irrelevant; the only considerations for due process purposes are what contacts the defendant had with the forum. However, the Supreme Court of Minnesota based personal jurisdiction over On-Deck upon such factors as "Minnesota's interest in the litigation" and "the convenience of the parties", particularly the con-

venience of the Respondents who are Minnesota residents. *Rostad v. On-Deck, Inc., supra,* Slip Op. at p. 10, Appendix at A-10. Such considerations are contrary to the Due Process clause and the case law of the Supreme Court of the United States:

> "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before tribunals of another state; *even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location* for the litigation, the Due Process clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen v. Woodson, supra,* at 294 (emphasis supplied).

See also, Hanson v. Denkla, supra, at pp. 251, 254; *Rush v. Savchuk, supra,* at p. 332. By basing jurisdiction upon such factors as Minnesota's interest in the litigation and the convenience of the plaintiffs, the decision of the Supreme Court of Minnesota is patently violative of due process and the clear and unambiguous holdings of the Supreme Court of the United States. Those factors have no place in the due process paradigm.

The Opinion of the Supreme Court of Minnesota is in conflict with the case of *Worldwide Volkswagen v. Woodson,* 444 U.S. 286 (1980), where this court found no personal jurisdiction over New York and New Jersey corporations in Oklahoma when the corporations had no direct contacts with Oklahoma and the product reached the forum fortuitously. The court shattered the stream of commerce-foreseeability theory when it held:

> "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297.

As recognized by this Court, if mere foreseeability were the rule, every seller of chattels would appoint the chattel as agent for service of process and amenability to suit would travel with the chattel. *See,* 444 U.S. at 296. Although the Court recognized in dicta there may be some situations where a product manufacturer takes direct affirmative efforts to serve the market in the forum and a consumer purchases the product in the forum that may not offend the due process clause. *See,* 444 U.S. at 297-98. That is not the case here. On-Deck took no steps to serve the Minnesota market; it merely sold products to a distributor and had no knowledge of where subsequent sales were made. It did not seek to serve the Minnesota market. There is no evidence the product reached the forum in the stream of commerce; it was merely found in the forum. If jurisdiction were upheld, every manufacturer would be subject to jurisdiction wherever its products wind up and however they get there. A manufacturer would in effect appoint the product as agent for service with amenability to suit traveling with the product. Such a result is contrary to the express holding of *Worldwide Volkswagen* and the Due Process clause of the Fourteenth Amendment. If a stream of commerce theory is to be applied at all, then at a minimum there should be a showing that the product reached the forum in the stream of commerce. There has been no such showing here.

3. The Opinion Of The Supreme Court Of Minnesota Conflicts With A Decision Of Another State Court Of Last Resort.

The Opinion of the Supreme Court of Minnesota is in conflict with the Supreme Court of Arizona decision in *Rowell Industries, Inc. v. Superior Court*, 117 Ariz. 400, 573 P.2d 91 (1977), which held that a manufacturer was not subject to the personal jurisdiction of Arizona courts due to the business activities and sales by distributors in the forum. In the case at bar, the Supreme Court of Minnesota based jurisdiction upon sales of other products, not the subject product, by distributors occurring after the subject product had been manufactured.

4. These Are Important Questions Of Federal Law Which Have Not Been, But Should Be Decided By This Court.

The Supreme Court of the United States has not decided a case concerning personal jurisdiction over a foreign product *manufacturer* having no direct contacts with the forum; and has never decided a case concerning the applicability of a stream of commerce jurisdiction theory in a products case when there is no showing that the product reached the forum in the stream of commerce.

These are important questions of federal law which are likely to recur, and which have been the subject of conflicting opinions among the federal courts of appeals and the state courts of last resort. If the Opinion of the Supreme Court of Minnesota were allowed to stand, the consequences to product manufacturers would be disastrous. A manufacturer would be subject to suit in distant forums with which it has had no direct contacts merely because a separate and independent corporation with which it does business also happens to do

business in the forum. And it would matter not whether the product reached the forum in channels of commerce; amenability to suit would travel with the product. Manufacturers would be subject to jurisdiction wherever the product landed and no matter how it arrived. The making and selling of a product would be analogous to appointing the product as agent for service of process with jurisdiction following the product.

The Due Process clause never contemplated such a result, which would in essence erase state lines and allow state courts to reach beyond the limits imposed upon them by their status as coequal sovereigns in a federal system. The Due Process clause limits the power of states to reach beyond its borders to subject a foreign corporation to suit when that corporation has no contacts, ties or relations with the state. The questions in this case involve the crucial issue of the power of states to subject foreign corporations to suit within the framework of the Due Process clause and the federal system of government.

VII. CONCLUSION

An exercise of personal jurisdiction over a small foreign corporation having no contacts with a forum violates due process. The application of a stream of commerce jurisdiction theory in a case in which it cannot be shown that the product reached the forum in the stream of commerce violates due process. Basing jurisdiction upon such factors as the interest of the forum in the case and the convenience to plaintiffs violates due process. Personal jurisdiction cannot constitutionally be asserted upon the fortuitous entry of a product into a forum.

If this Court does not grant certiorari in this case, the Minnesota courts will continue to assume jurisdiction in product liability cases based only upon the forum's interest in the litigation and the convenience of the plaintiff regardless of whether the product reached the forum in the stream of commerce.

Petitioner On-Deck, Inc. respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Minnesota filed on August 16, 1985.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

No. C2-84-235

DEAN A. and BARBARA J. ROSTAD,
Respondents,

vs.

ON-DECK, INC., petitioner,
Appellant,

GARY GUY WILLEY,
Respondent,

SPORTCRAFT COMPANY,
Respondent.

Court of Appeals, Yetka, J. Took no part, Coyne, J.
Filed August 16, 1985.

WAYNE TSCHIMPERLE
Clerk of Appellate Courts

SYLLABUS

A manufacturer who places a product in the stream of commerce with the expectation that the product will be used in another state is subject to the jurisdiction of that state's courts.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

YETKA, Justice.

While umpiring a softball game in the Twin Cities, Dean Rostad was hit in the head by a metal ring used as a bat weight

that flew from the end of the bat of the batter who was warming up on deck. Rostad sued the manufacturer of the bat weight, On-Deck, Inc., in Hennepin County District Court. On-Deck moved that the case be dismissed for lack of personal jurisdiction. The trial court granted the motion and ordered entry of the judgment in On-Deck's favor. The judgment was entered on January 9, 1984. Rostad appealed to the Minnesota Court of Appeals on February 6, 1984. The court of appeals reversed the trial court. On-Deck petitioned this court for further review; the petition was granted. We affirm the court of appeals.

On-Deck, Inc., is a New Jersey corporation formed to manufacture a solid metal, vinyl covered weight. It is shaped like a donut so that it slips over the handle of a baseball bat, slides down and, ideally, lodges itself on the bat's barrel. A batter warming up will slip the weight on and swing the bat as hard as possible. If the bat's barrel is small enough, however, the weight can slip off the end and fly through the air. Just such an event happened in this case. A bat weight slipped off the end of a batter's bat and hit Dean Rostad, who was umpiring, in the head. The blow severely injured Rostad, who, after extensive hospitalization, still suffers, mental, motor, and verbal difficulties.

Although having no offices in Minnesota, owning no property in Minnesota, having no agent appointed in Minnesota, and not being licensed to do business in Minnesota, On-Deck has sold a great number of its bat weights here through distributors. From 1968, when the weight first went on the market, until 1973, On-Deck contracted with General Sportcraft to be the bat weight's exclusive distributor for the "continent of North America, the state of Hawaii, and all islands in the Caribbean Sea and the Gulf of Mexico." After

1973, On-Deck sold weights directly to national distributors such as Sears, K-Mart, and Hillerich & Bradsby Co.

On-Deck retained the right to sell and market to major league baseball teams. It required that its "On-Deck" trademark be prominently displayed on all packages of the bat weight. A picture of Elston Howard, former Yankee great and president of On-Deck, Inc., was prominently displayed on each package. Elston Howard and Frank Hamilton, the weight's inventor and owner of On-Deck, Inc., traveled the country extensively marketing the weight. Professional baseball teams were specifically targeted for marketing, presumably for the national exposure and stature that their use of the weight would provide.

The plaintiffs presented a number of sales receipts for purchases of bat weights from Minnesota sporting goods shops and departments. Affidavits from owners of sporting goods stores documented that the weights have been a popular product in Minnesota for a number of years. The Minnesota Twins have been buying the weights for at least 10 years. Nonetheless, Frank Hamilton has stated he never knew his bat weight was ever sold in Minnesota.

The bat weight that struck Rostad was found by Gary Willey at a ballfield in St. Louis Park where he worked as a groundskeeper. Willey brought the bat weight to softball games, including the game where Rostad was injured. There is no evidence as to how this particular bat weight found its way to Minnesota. For the purposes of this appeal only, On-Deck assumes that it manufactured the weight.

The issue in this case is whether Minnesota can exercise jurisdiction over a foreign corporation which sells products in Minnesota through distributors under a "stream of commerce" theory and when the plaintiffs cannot show how the particular product arrived in the state.

The plaintiffs seek personal jurisdiction over On-Deck, Inc., a New Jersey corporation, by Minnesota's long-arm statute. It allows jurisdiction over a defendant if that defendant "[c]ommits any act outside Minnesota causing injury or property damage in Minnesota." Minn. Stat. § 543.19, subd. 1(d) (1984). Since we have determined that the legislature intended the statute to have the maximum extraterritorial effect allowed under the due process clause of the federal constitution, the permissibility of an attempted exercise of jurisdiction may be tested by analyzing whether it meets constitutional muster. *Vikse v. Flaby*, 316 N.W.2d 276, 281 (Minn. 1980); Note, *Due Process and Long-Arm Jurisdiction in Minnesota*, 5 Wm. Mitchell L. Rev. 287, 314-16 (1979).

Due process requires that a defendant have minimum contacts with a jurisdiction before being required to defend against a lawsuit in that jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Requiring minimum contacts both protects a defendant from burdensome litigation in a far-flung jurisdiction and vindicates the status of states as co-equal sovereigns within the federal system. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980). To have minimum contacts, the defendant must have purposefully availed itself of the privilege of conducting activities within the jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In Minnesota, a five-factor test first enunciated in the Eighth Circuit case of *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965), is used to determine if minimum contacts exist. It requires the court to evaluate:

(1) The quantity of contacts with the forum state,

(2) The nature and quality of contacts,

(3) The source and connection of the cause of action with these contacts,

(4) The interest of the state providing a forum,

(5) The convenience of the parties.

Vikse v. Flaby, 316 N.W.2d at 282. The first three factors are the most important, the last two of lesser importance. *Dent-Air, Inc. v. Beech Mountain Air Service, Inc.*, 332 N.W.2d 904, 907 (Minn. 1983).

1. The Quantity of the Contacts

Despite having sold thousands of its bat weights here, On-Deck claims it has no contacts with Minnesota. On-Deck points out that it has never had an office, sales outlet, place of business, or agent for service of process here. It claims it has never had a direct contact with Minnesota. This may be true, but it fails to account for On-Deck's numerous indirect contacts with Minnesota.

On-Deck ignores its indirect contacts with Minnesota because it believes that, after the United States Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), "purposeful contacts" must be direct contacts. Placing a product in the stream of commerce that leads to a state does not subject a manufacturer to jurisdiction, according to On-Deck, because such contacts are indirect rather than direct. On-Deck's frontal assault on the stream-of-commerce theory of jurisdiction misconstrues *World-Wide Volkswagen*, ignores the Supreme Court's express recognition of the theory, forgets scholarly comment on the subject, and fails to account for the plethora of cases upholding jurisdiction under a stream-of-commerce theory.

The *World-Wide Volkswagen* case dealt with a regional distributor and a retail dealer of cars at the end of the distribution chain who were being hailed into court in a jurisdiction far from their areas of distribution simply because the plaintiff had driven the car to that jurisdiction. *Id.* at 289. Juris-

diction over the automobile's manufacturer and importer was assumed, though not at issue. *Id.* at 317-18 (Blackmun, J., dissenting). Regional distributors and retail dealers cannot, according to the Supreme Court, be forced to defend lawsuits in jurisdictions far from their area of business just because a plaintiff brought the product to the jurisdiction. *Id.* at 298.

Far different, however, is the situation of a manufacturer or a primary distributor:

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum *State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.*

Id. at 297-98 (emphasis added). To hold otherwise would be to "doom all products liability cases to dismissal from forums other than the place of manufacture or initial sale." Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L.Rev. 429, 442-43 (1981); *see also* Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 Colum. L.Rev. 1341, 1360-61 n.146 (1980).

Courts have uniformly followed the United States Supreme Court's admonition in *World-Wide Volkswagen* and held manufacturers subject to personal jurisdiction under the stream-

of-commerce theory. *E.g., Nelson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1277-78 (1984); *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So. 2d 1305 (Fla. 1981); *Svendsen v. Questor Corp.*, 304 N.W. 2d 428 (Iowa 1981). As the Iowa Supreme Court wrote, even though the actual marketing of the product is done by intermediaries:

> [T]hrough their actions in marketing their product, [the defendants] sought to serve the Iowa market, and therefore should be amenable to the jurisdiction of the Iowa courts. * * * it is reasonable to infer that their commercial transactions resulted in more than insubstantial use and consumption in this state. *See Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 441-42, 176 N.E.2d 761, 766 (1961). This affords a sufficient basis for the conclusion that *the* [*defendants*] *through the Omaha distributor, indirectly sought to serve the Iowa market, and consequently are subject to suit within this state.*

Id. at 431 (emphasis added). According to the Seventh Circuit, even though the defendants "did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along a stream of commerce destined for retail sale throughout the United States." *Nelson v. Park Industries, Inc.*, 717 F.2d at 1126; *see Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1085 (5th Cir. 1984).

In essence, the "fairness requirement of due process does not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products." *DeJames v. Magnificence*

Carriers, Inc., 654 F.2d 280, 285 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981); *accord Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983); *Noel v. S. S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982); *Shanks v. Westland Equip. and Parts Co.*, 668 F.2d 1165 (10th Cir. 1982). A manufacturer who places its product in the stream of commerce in an effort to serve, directly or indirectly, markets in a jurisdiction is subject to suit in that jurisdiction under *World-Wide Volkswagen*.

Although On-Deck does not have any direct contacts with Minnesota that can be proven in this case, it has a plethora of indirect contacts. It entered into contracts with others to distribute its products throughout North America, Hawaii and the Caribbean, a market which specifically includes Minnesota. The On-Deck trademark and Elston Howard's picture are on the packaging of every weight. Both Frank Hamilton, the owner of On-Deck, and Elston Howard, the president of On-Deck, have traveled the United States extensively marketing their product. On-Deck's distributors have, in fact, attempted to and been quite successful at marketing the product in Minnesota, and On-Deck has profited as a result. Frank Hamilton's claim that he never knew his products were marketed in Minnesota, aside from its incredulity, is irrelevant. On-Deck's distribution contracts and marketing efforts were calculated attempts to create a national market for his product, a market which specifically includes Minnesota. The bat weights arrived here not by some fortuitous happenstance of a plaintiff bringing the product to the jurisdiction as in *World-Wide Volkswagen*, but by the purposeful marketing efforts of On-Deck and On-Deck's distributors. On-Deck, having attempted and succeeded in penetrating the market in Minnesota for bat weights, albeit through distributors, has had numerous contacts with Minnesota.

2. The Nature and Quality of the Contacts

The appellant argues that because this bat weight was found on a field and there is no way of discovering how the weight came to this state, On-Deck's contacts with Minnesota are not of a quality sufficient to support jurisdiction. This argument ignores the fact that often there is no way that a plaintiff can know how a defective product actually weaved its way through commerce's labyrinth. The fact that the manufacturer's goods came to the jurisdiction by an unknown and thereby a possibly circuitous route does not change the fact that the product injured someone in a jurisdiction where the manufacturer can expect to be sued.

In *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the Illinois Supreme Court not only did not know how the particular offending product got to the state, it had no idea if any of the manufacturer's other products had ever been in the state. *Id.* at 442, 176 N.E.2d at 766. Rather, the Illinois court inferred sufficient number and quality of contacts as a reasonable assumption from the character of the business. *Id.* The United States Supreme Court found no difficulties with the Illinois court's analysis. *World-Wide Volkswagen*, 444 U.S. at 298. Thus, the plaintiffs' inability to trace the bat weight's route to Minnesota in no way deprives Minnesota of jurisdiction.

The nature of On-Deck's contacts have been for the most part, sales. It has profited by sale of thousands of its bat weights in Minnesota. In a commercial operation, sales are the most tangible contact with a jurisdiction. Although through intermediaries, these sales were accomplished under the marketing contracts for the benefit of On-Deck. Additionally, there was marketing on On-Deck's part. It specifically required that its trademark be placed prominently on

the packages of its product. Elston Howard, the president of the company, was pictured on every package. It can be assumed that its distributors also marketed the product in this state. On-Deck thrust its corporate image into the jurisdiction, both by its own packaging requirements and the actions of its distributors, and profited by it. The nature and quality of On-Deck's contacts weigh in favor of jurisdiction.

3. The Source of the Contacts

The source of the contacts is, in the first instance, from On-Deck itself. It wanted a national market, a market including Minnesota, so it contracted with others to achieve its distribution goals. Through savvy marketing, the bat weight became a desirable item, desirable enough that somebody purchased this bat weight and desirable enough that, when found, it was put to use at its intended purpose. On-Deck will not now be allowed to hide behind the structuring of its distribution system when On-Deck's intent was to enter the market here and profit thereby. Thus, the source and connection of the contacts with the cause of action weigh in favor of jurisdiction.

4. Minnesota's Interest in the Litigation

Minnesota's interest in the litigation is obvious. Minnesota was the site of this accident and a Minnesotan has been severely injured. This factor, albeit of minor consideration, weighs in favor of jurisdiction.

5. The Convenience of the Parties

Finally, all the witnesses of the accident and plaintiffs reside here in Minnesota. Only the defendant resides elsewhere. Minnesota is the convenient and logical forum for this litigation. Again, though of minor interest in comparison to the first three factors, convenience seems to weigh in favor of jurisdiction in Minnesota.

In short, On-Deck sold thousands of its bat weights in Minnesota. The reason the weights were sold here is that On-Deck contracted with General Sports and other national retailers to serve the national market and, specifically, the Minnesota market. It profited thereby. This is purposeful availment by On-Deck of the benefits and corresponding responsibilities of doing business in Minnesota. Traditional notions of fair play and substantial justice dictate that On-Deck should defend this lawsuit in Minnesota; they would be offended if these plaintiffs were limited to suit in New Jersey.

The court of appeals is affirmed.

COYNE, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN COURT OF APPEALS

C2-84-235

Hennepin County Lansing, Judge

DEAN A. and BARBARA J. ROSTAD,

Appellants,

vs.

ON-DECK, INC., a New Jersey Corporation,

Respondent,

and

GARY GUY WILLEY,

Respondent.

Appellants' Attorney, Leo F. Feeney, Robins, Zelle, Larson & Kaplan, 1210 Minnesota Building, St. Paul, Minnesota 55102.

Respondents' Attorneys, Graham Heikes, Brian N. Johnson, Jardine, Logan & O'Brien, 1350 Northern Federal Bldg., St. Paul, Minnesota 55102.

Endorsed.

Filed September 4, 1984.

WAYNE TSCHIMPERLE
Clerk
Minnesota Appellate Courts

SYLLABUS

Minnesota courts can constitutionally exercise jurisdiction in a products liability action over an out-of-state manufacturer that distributes its products through a nationwide distributor with representatives in Minnesota.

Reversed.

Heard, considered and decided by Lansing, Presiding Judge, Wozniak, Judge, and Forsberg, Judge.

OPINION

LANSING, Judge.

Dean and Barbara Rostad appeal from an order dismissing their products liability action for lack of personal jurisdiction. The Rostads commenced this action in April 1980 seeking recovery of personal injury damages from On-Deck, Inc., a New Jersey corporation. On-Deck's answer alleged, among other things, the affirmative defense of lack of personal jurisdiction. The trial court found On-Deck's contacts with Minnesota insufficient to support long-arm jurisdiction because On-Deck had not personally entered this state. We reverse.

FACTS

On-Deck, Inc., a New Jersey corporation, manufactures a vinyl-covered solid metal bat-weight used to increase the weight of an ordinary baseball bat for practice swings and

warm-up exercises. The ring-shaped weight fits over the handle of a bat and is designed to be secured by the bat's thick end.

In 1978 Gary Guy Willey, a groundskeeper for the City of St. Louis Park, found a bat-weight while cutting grass on a city ballfield. On-Deck admits for purposes of this appeal that it manufactured the weight. Willey allowed his teammates on the Golden Leaf Bar softball team to use the weight during the 1978 softball season. During a game in Minneapolis on August 6, 1978, the 1-1/4-pound weight flew off the bat of a warming-up, or "on-deck," batter and struck the umpire, Dean Rostad, in the head. Rostad was seriously and permanently injured.

The On-Deck bat-weight was invented by Frank Hamilton in 1967. He incorporated in New Jersey under the name "On-Deck" in 1968 and contracted with a foundry to begin manufacture of the product. Shortly after incorporation Hamilton took his bat-weight to General Sportcraft Company, Ltd., a New York corporation authorized to do business in New Jersey. General Sportcraft, a national distributor of sporting goods, was interested in handling the product but said advance promotion and publicity were necessary.

Hamilton subsequently went into partnership with Elston Howard, a prominent professional ballplayer. They traveled extensively, promoting the weight to professional baseball teams and at a sporting goods show. Later in 1968 General Sportcraft and On-Deck entered into a distribution agreement under which On-Deck was the manufacturer and General Sportcraft the promoter and exclusive distributor of On-Deck bat-weights. On-Deck agreed to sell in bulk to General Sportcraft for resale and distribution "throughout the continent of North America, the state of Hawaii, and all islands in the

Caribbean Sea and the Gulf of Mexico." Packages were to be labeled "Elston Howard's On-Deck Bat-Weight." Howard agreed to continue to make promotional appearances.

From 1969 to 1980 General Sportcraft had one or more representatives in Minnesota who sold bat-weights, in addition to other sporting goods, to retail stores throughout the state. After 1973 General Sportcraft was no longer the exclusive distributor of the On-Deck bat-weight; On-Deck began bulk sales to a number of other nationwide distributors, including Sears, K-Mart, and Hillerich & Bradsby Co. At no time, however, did On-Deck itself directly sell any bat-weights in Minnesota.

The trial court held that On-Deck did not have sufficient contacts with Minnesota to permit constitutional exercise of personal jurisdiction under Minnesota's long-arm statute, Minn. Stat. §543.19 (1982), reasoning that On-Deck never personally entered the state through an office, a telephone call, or any sales representatives.

ISSUE

Does an out-of-state manufacturer distributing a product through a nationwide distributor have sufficient contacts with Minnesota to support long-arm jurisdiction in a products liability suit arising in Minnesota?

ANALYSIS

The Minnesota long-arm statute, Minn. Stat. §543.19 (1982), provides for long-arm jurisdiction over a foreign corporation when that corporation commits an act outside of Minnesota that causes injury or property damage inside the state. *Id.* §543.19, subd. 1(d). The statute was drafted in an effort to extend long-arm jurisdiction to the maximum extent allowed by the due process clause of the United States Constitution. *E.g. Vikse v. Flaby*, 316 N.W.2d 276, 281 (Minn.

1982) (citing *Toro Co. v. Ballas Liquidating Co.*, 572 F.2d 1267, 1269 (8th Cir. 1978)). A court may constitutionally exercise jurisdiction over a defendant if the defendant has sufficient "minimum contacts" with the forum state so that requiring the defendant to defend there does not violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Supreme Court clarified the meaning of "minimum contacts" in *Hanson v. Denckla*, 357 U.S. 235 (1958), finding that it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

The minimum contacts test performs two functions, as explained by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). It protects the defendant from burdensome litigation in a distant or inconvenient forum, and it also promotes federalism by ensuring that states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 291-92.

To determine the constitutional sufficiency of a defendant's contacts with the state, Minnesota has adopted the five-factor test set out in *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965). *See e.g. Dent-Air, Inc. v. Beech Mountain Air Service, Inc.*, 332 N.W.2d 904 (Minn. 1983). The following factors are considered:

(1) the quantity of contacts,

(2) the nature and quality of contacts,

(3) the source and connection of those contacts to the cause of action,

(4) the interest of the forum state, and

(5) the convenience of the parties.

Id. at 907. The first three factors are given primary consideration, while the last two are considered less important. *Id.*

The factors of forum interest and convenience do not deprive the court of jurisdiction in this case. Minnesota's interest in providing a forum is clear: Rostad is a resident, he sustained the injury in this state, and because the New Jersey statute of limitations has run, Minnesota is the Rostads' only available forum. On-Deck concedes that the convenience of the parties weighs equally. The Rostads' witnesses reside in Minnesota; On-Deck's will likely come from New Jersey. Although it will be expensive for On-Deck to defend in Minnesota, this factor is less important than consideration of On-Deck's contacts with the state. *See Dent-Air, Inc.*, 332 N.W.2d at 909.

The facts applicable to factors (1) and (3) also militate in favor of asserting jurisdiction. On-Deck had a substantial number of contacts with Minnesota. Retail sporting goods stores throughout the state sold On-Deck bat-weights, distributed by General Sportcraft, for 13 years. The Minnesota Twins bought the weights for ten years, and thousands were sold through retail outlets. The "source and connection" of On-Deck's contacts are also closely related to the Rostads' cause of action. On-Deck has stipulated, for purposes of this appeal, that it manufactured the weight that injured Rostad. Rostad's injury thus arose out of a specific forum-related act—the distribution of On-Deck bat-weights to Minnesota retailers and the consequent sale and use of the weight that caused the injury.

The "nature and quality" of On-Deck's contacts with Minnesota requires a more thorough analysis. On-Deck has never

had an office, property, mail or telephone listing, or any sales agents in Minnesota and has never made any direct sales or solicited business in the state. On-Deck argues, therefore, that its contacts with Minnesota are insufficient to support jurisdiction because it has not purposefully availed itself of the benefits and protections of Minnesota law. *See Hanson v. Denckla*, 357 U.S. at 253.

On-Deck's lack of direct contacts with Minnesota does not necessarily preclude personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 298 (1980), the Supreme Court discussed the "stream-of-commerce" theory of personal jurisdiction in a products liability case. *World-Wide Volkswagen* involved the propriety of an Oklahoma court's exercise of personal jurisdiction over a regional distributor and a retail dealer of foreign-manufactured automobiles. Both defendants were New York corporations who did no business outside of New York, New Jersey and Connecticut. The plaintiffs, also New York residents, were injured in Oklahoma. They argued that the defendants should be subject to suit in Oklahoma because it was foreseeable that an automobile purchased in New York would cause injury in Oklahoma. The Court rejected this argument, determining that foreseeability that a manufacturer's product will end up in a state is not *alone* sufficient to make the manufacturer amenable to suit in that state. *See id.* at 295-96.

The Court went on to note, however, that foreseeability is still a relevant factor. As explained by the Court, "the foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297. The Court explained in dicta that where the sale of a manufacturer's or distributor's product

> is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98 (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)). A number of courts have relied on this dicta to sustain jurisdiction in products liability cases where the product has traveled through a chain of distribution before reaching the ultimate consumer. *See e.g. Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); and cases cited in Note, *The Long-Arm Reach of the Courts After* Kulko v. Superior Court, 65 Va. L. Rev. 175 (1979).

The "stream-of-commerce" theory satisfies due process requirements because the manufacturer avails itself of the "protections and benefits" of the forum state's laws through the protection those laws provide for the product and through the pecuniary benefit from indirect sales to forum residents. *See e.g. DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). It can fairly be said that On-Deck purposefully availed itself of the privilege of conducting business in Minnesota as a result of On-Deck's relationship with its distributor, General Sportcraft. On-Deck knew that General Sportcraft was a nationwide dis-

tributor and that General Sportcraft actively distributed and promoted On-Deck bat-weights in Minnesota for over ten years. On-Deck received economic benefit from bat-weights sold in Minnesota and legal benefit from the protection Minnesota courts provide for businesses in the state.

In *World-Wide Volkswagen* the Court drew a distinction between a dealer or distributor seeking to serve a limited or local market and a manufacturer or national distributor. *See World-Wide Volkswagen* at 297-98. Here, although On-Deck itself did not sell in Minnesota, it did not confine its market to a limited area. Rather, it marketed its product nationwide through General Sportcraft and its other distributors. On-Deck did nothing to limit sales in Minnesota and, indeed, because of its financial stake in bat-weight sales, actively encouraged and benefited from such sales. On-Deck could clearly foresee that its bat-weights would end up in Minnesota. Although this factor alone is insufficient to support jurisdiction, On-Deck's conduct and connection with Minnesota made it foreseeable that On-Deck might be involved in litigation in the state; thus, it is both reasonable and fundamentally fair for Minnesota to exercise personal jurisdiction over On-Deck. The United States District Court for the Eastern District of Pennsylvania recognized the problem of allowing manufacturers and distributors to profit from nationwide distribution while remaining insulated from liability in *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F.Supp. 328, 334 (E.D. Pa. 1982). The *Rockwell* court, finding long-arm jurisdiction over a French corporation that manufactured parts for helicopters sold through a United States distributor, quoted the Third Circuit:

> Underlying the assumption of jurisdiction in these cases is the belief that the fairness requirements of due process

> do not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products.

Rockwell, 553 F.Supp. at 334 (quoting *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981)).

This jurisdictional determination makes it unnecessary to decide the additional issue raised by the Rostads of whether On-Deck waived its jurisdictional defense by its failure to completely answer an interrogatory requesting the bases of the defense.

DECISION

Accordingly, we find that the Minnesota courts may properly exercise in personam jurisdiction over On-Deck. We therefore reverse the trial court's decision.

Reversed.

HARRIET LANSING
August 28, 1984

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Court File No. 766532

DEAN A. and BARBARA J. ROSTAD,

Plaintiffs,

vs.

ON-DECK, INC., a New Jersey corporation, and GARY GUY WILLEY,

Defendants.

SUPPLEMENTAL ORDER

The above-entitled matter came duly on for hearing before the Honorable Lindsay G. Arthur, a Judge of the District Court, at a special term thereof on December 9, 1983, on Defendant On-Deck's Motion for Summary Judgment.

Leo Feeney, Esq., appeared as counsel for and on behalf of Plaintiffs; Brian N. Johnson, Esq., appeared as counsel for and on behalf of Defendant On-Deck; there was no appearance on behalf of Defendant Gary Guy Willey.

Upon all the files, records, proceedings, and arguments of counsel herein, and the Court being fully advised in the premises,

IT IS ORDERED, that:

1. Defendant On-Deck's Motion for Summary Judgment is granted.
2. The attached Memorandum is incorporated herein by reference.
3. There is no just reason for delay; and Defendant On-Deck is entitled to entry of judgment in its favor.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 22nd day of December, 1983.

By The Court:
LINDSAY G. ARTHUR
Judge of District Court

MEMORANDUM

Defendant On-Deck manufactures a heavy ring which temporarily fits on the end of a baseball bat to enable a player to take practice swings while in the on deck circle instead of swinging two or three bats. The rings are marketed in Defendant's packaging in all fifty states through various national distributors such as Sears, K-Mart, General Sportcraft, and Hillerich & Brandsby. Defendant itself does no retail market-

ing nor does it do any advertising except through the packaging. It maintains no offices, telephones 'etter drops, or indicia of business in any state except New Jersey.

Defendant Willey, while employed as a maintenance person cutting grass in a public ball park, found a ring manufactured by Defendant On-Deck. He put it in use in a baseball team with which he was connected. During a game on August 6, 1978, the ring flew off the bat of a player waiting in the on deck circle and struck Plaintiff who was the umpire, causing serious injuries.

Plaintiff commenced this action in Minnesota, personally serving an appropriate person in Defendant's New Jersey office on April 21, 1980. Defendant On-Deck served its Answer on April 24, 1980, alleging, *inter alia*, lack of jurisdiction of the Minnesota courts as an affirmative defense. On October 25, 1983, after the New Jersey statute of limitations had run, Defendant On-Deck brought on this motion for Summary Judgment for lack of jurisdiction.

The issue is whether Defendant On-Deck had a sufficient connection to Minnesota to support *in personam* jurisdiction.

In addition to legitimate state interest which exists here, the current tests of long-arm jurisdiction use such phrases as "minimum contacts," "chain-related contacts," "expectation of suit," Posnak, "A Uniform Approach to Judicial Jurisdiction after *World-Wide* and the Abolition of the 'Gotcha Theory'." 30 Emory Law Review 729. It's not enough of a connection for the manufacturer of a product that the product is sold in the state if the sale is not made by the manufacturer or an agent of the manufacturer. If such a rule were adopted, every manufacturer who sold exclusively through a national retail chain such as Sears would immediately become liable to defend litigation in all fifty states, contrary to the federality concept of

the Constitution. A manufacturer must in some form personally enter a state, by an office, or a telephone, or a sales representative. The mere entry of the product, even in the manufacturer's package, is not enough.

LGA

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

File No. 766532

DEAN A. and BARBARA J. ROSTAD,

Plaintiffs,

vs.

ON-DECK, INC., a New Jersey corporation,

and

GARY GUY WILLEY,

Defendants.

STATE OF NEW JERSEY—ss
County of

AFFIDAVIT OF FRANK G. HAMILTON

Frank G. Hamilton, being first duly sworn on oath, deposes and says that at all times material herein he was the President of defendant On-Deck, Inc. and has personal knowledge of the facts contained in this Affidavit;

That On-Deck, Inc. is a New Jersey corporation with offices in Westwood, New Jersey, and that it is and was a small closely held corporation with between three and five employees;

That On-Deck, Inc. has never owned, leased, or possessed property within the State of Minnesota;

That On-Deck, Inc. has never had an office, sales outlet or place of business in Minnesota;

That On-Deck, Inc. has never been licensed to do business in Minnesota and has never had an authorized agent for service of process in Minnesota;

That On-Deck, Inc. has never employed any persons in Minnesota, and none of its officers or shareholders have ever resided in Minnesota;

That On-Deck, Inc. has never had a mailing address, telephone listing or bank account in Minnesota, and has never recruited employees from Minnesota;

That On-Deck, Inc. has never been registered with nor licensed by any public agency in Minnesota;

That On-Deck, Inc. has never actively solicited business in Minnesota, nor has it engaged in advertising that is calculated to reach Minnesota markets;

That On-Deck, Inc. has never sold bat weights directly in Minnesota;

That between 1968 and 1973, On-Deck, Inc. sold bat weights in bulk to General Sportcraft, a New Jersey distributor, and that General Sportcraft performed all promotions and coordinated marketing of the product, and that On-Deck, Inc. was not involved in any subsequent sales;

That in 1973, other companies began purchasing On-Deck, Inc.'s bat weights for distribution, including Hillerich and Bradsby, Dryer Corporation, Schramm, Sears & Roebuck, and K-Mart; however, at no time did On-Deck, Inc. make any direct sales of bat weights in Minnesota, and all of On-Deck, Inc.'s sales to distributors occurred in states other than Minnesota;

That On-Deck, Inc. has never been made aware of the specific states into which the product was distributed, although on information and belief, it is speculated that the

product was distributed in all states by entities other than On-Deck, Inc.;

That On-Deck, Inc. was not involved in the distribution of the said product beyond sales to distributors;

That Mrs. Adele Lyons, at all times material herein, has been employed at On-Deck, Inc. as a secretary/stenographer, and that Mrs. Adele Lyons is not an officer, shareholder, director, managing agent, or agent authorized to accept service of process for On-Deck, Inc.;

FURTHER YOUR AFFIANT SAITH NOT, except that he makes this Affidavit in support of On-Deck, Inc.'s motion to dismiss for lack of personal jurisdiction and insufficient service of process.

FRANK G. HAMILTON

Subscribed and sworn to before me this 11th day of October, 1983.

REGINA R. MEANY
Notary Public

85-594

No. ——

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

DEAN A. and BARBARA J. ROSTAD,
Respondents,

vs.

ON-DECK, INC., a New Jersey corporation,
Petitioner,

and

GARY GUY WILLEY, and GENERAL SPORTCRAFT CO. LTD., a New Jersey corporation,
Defendants.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

Whether the exercise of personal jurisdiction by a Minnesota court over an out-of-state manufacturer of a nationally and internationally marketed consumer product, in connection with an action brought by a Minnesota resident severely injured in Minnesota by that product, complies with the Due Process Clause of the Fourteenth Amendment, where the manufacturer purposefully utilized large national distributors to achieve maximum nationwide marketing of that product, realized substantial profits from the bulk sale of that product in Minnesota each year and could thereby reasonably anticipate being haled into court in Minnesota.

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II.

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IN THE

Supreme Court of the United States

No. ———

October Term, 1985

DEAN A. and BARBARA J. ROSTAD,
Respondents,

vs.

ON-DECK, INC., a New Jersey corporation,
Petitioner,

and

GARY GUY WILLEY, and GENERAL SPORTCRAFT CO. LTD., a New Jersey corporation,
Defendants.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

III.

STATEMENT OF THE CASE

A. The Injury.

Petitioner On-Deck, Inc., a New Jersey corporation, manufactures a vinyl-covered, solid metal bat-weight, ring shaped and molded similar to a donut. Designed to add weight to ordinary bats for use by ballplayers when "on-deck" during warm-up exercises or during practice swings, the bat-weight slips onto the handle end of the bat and is

supposed to be secured by the thick end of the bat. The velocity attained by the bat-weight during a practice swing is considerable, transforming the weight into an extremely hazardous missile if the weight should separate from the bat.

Respondent Dean Rostad suffers severe and permanent brain damage as a result of such an accident. While umpiring an official softball game of the Parks and Recreation League of the City of Minneapolis on August 6, 1978, Dean Rostad was suddenly and unexpectedly struck in the skull by a 1-1/4 pound bat-weight manufactured by On-Deck. Mr. Rostad's head injury resulted in extensive hospitalization and severe residual mental, motor and verbal impairment. Similar accidents involving On-Deck's bat-weights have occurred in other states.

B. On-Deck's National and International Marketing Scheme.

On-Deck has manufactured a variety of bat-weights continuously since 1968. Throughout this 16-year period, On-Deck has engaged in a carefully and selectively chosen marketing scheme calculated to maximize the sales of its products throughout the United States, Canada and Mexico. To achieve its international marketing goals, On-Deck initially developed a highly profitable relationship with Elston Howard, a well-known baseball personality. Howard was made president of On-Deck and, as its agent, traveled throughout the United States making personal appearances at sporting goods shows and retail stores to promote the bat-weight and to give it a national identity. These highly advantageous promotional appearances were scheduled and arranged entirely by On-Deck. In addition, Frank Hamilton, then executive vice-president of On-Deck,

made promotional appearances at spring training camps throughout the United States and promotional trips with Elston Howard.

Recognizing the need for a nationally-based distributor of sporting goods to achieve its marketing goals, On-Deck negotiated an exclusive distributorship contract with General Sportcraft Co., Ltd., in 1968 (Appendix at A-6). General Sportcraft Co., Ltd., is a nationwide distributor of sporting goods and equipment with sales representatives serving all 50 states and several sales representatives physically located in the State of Minnesota.

The exclusive distributorship agreement between On-Deck and General Sportcraft is worthy of close scrutiny (Appendix at A-6). Pursuant to that contract, On-Deck agreed to sell its bat-weights in bulk to General Sportcraft for resale and distribution throughout "North America, [the] State of Hawaii, and all of the islands in the Caribbean Sea and the Gulf of Mexico." As with its relationship with Howard, On-Deck retained significant control and decision-making powers in this contract. The contract expressly retained control and power in On-Deck over the sale, promotion and marketing of the bat-weights nationwide. The contract notably provided, *inter alia*, that:

> —The On-Deck trademark was to be prominently displayed upon all packaging in which the product was to be sold to give On-Deck a national identity;
>
> —On-Deck retained the right to sell the bat-weight to the organized professional major league baseball teams and to individual members of organized professional major league baseball teams;
>
> —On-Deck retained the right to promote its product to the professional baseball teams in the United States, Canada and Mexico; and

—On-Deck retained the right to approve or disapprove of any design change in the individual packages for the bat-weight.

Notably, the contract describes the distributor's territory as its "franchised" area. This designation is entirely consistent with the fact that On-Deck was in fact directing the promotion, sales and marketing of its bat-weights nationwide, including within the State of Minnesota.

The deposition statements of Frank Hamilton reflect that, during his promotional trips, Mr. Hamilton took actual orders for the purchase of On-Deck bat-weights and then directed the orders to General Sportcraft for packaging and delivery. At a sporting goods show in New York in 1968, Hamilton testified that he directly sold 10,000 bat-weights and that General Sportcraft merely delivered the weights to his customers. On-Deck directed the sales, marketing, packaging and promotion of its bat-weights nationwide, and General Sportcraft provided the avenues for assembly and delivery to retailers and consumers on a mass scale.

Marketing and distribution of On-Deck's bat-weights continued pursuant to the terms of the General Sportcraft contract until approximately 1973 on an exclusive basis. Sometime after 1973, On-Deck began bulk sales of its bat-weights to a number of other nationwide distributors including Sears, K-Mart, and Hillerich & Bradsby Company.

Exhibit K to Plaintiffs' Memorandum in Opposition to defendant's Motion for Dismissal in the trial court (Appendix at A-1) demonstrates that plaintiffs, on their own, verified the sale of On-Deck's bat-weights throughout the State of Minnesota. Exhibit K consists of the following:

1. Receipts from various retail outlets including Sears Roebuck & Co., in the Twin Cities for the sale of On-Deck bat-weights;

2. Affidavit of J. W. Gallop, corporate sporting goods buyer for K-Mart, that until 1981, K-Mart carried On-Deck bat-weights in *all* of its Minnesota stores;

3. Affidavit from Gene Ronning, former Minnesota sales representative for General Sportcraft, stating that from 1969 through 1980, he sold On-Deck bat-weights to *virtually every sporting goods store in the State of Minnesota;*

4. Affidavit of Chris Olson, a Robins, Zelle, Larson & Kaplan legal assistant, of a conversation with Ray Krump, equipment manager for the Minnesota Twins, that he has been buying On-Deck bat-weights for *at least 10 years;* and

5. Affidavit of Neson Berman, owner of A & B Sporting Goods Company, that throughout the 1970s he marketed *thousands* of On-Deck bat-weights in Minnesota.

Petitioner clearly knew that its bat-weights were sold in Minnesota through its distributor, General Sportcraft. Defendant's answer to plaintiffs' Supplemental Interrogatory No. 6(b) unequivocally states in relevant part:

> General Sportcraft which for the past 13 years has packaged the bat-weights *and sold them to retail stores throughout Minnesota.*

In fact, in his deposition, Frank Hamilton testified that the bat-weight was sold in all 50 states.

For 16 years, On-Deck has purposefully injected its product into the stream of commerce pursuant to a care-

fully structured marketing scheme, calculated to maximize the commercial marketing of this product throughout the United States, Canada and Mexico. To achieve this end, On-Deck utilized large nationally-based distributors, physically located in the State of Minnesota. To ensure a nationwide identity with its product, On-Deck retained significant control over the marketing of its product, including the packaging of the product. On-Deck knew its product was sold throughout the State of Minnesota and realized a substantial profit from the bulk sale of its product in Minnesota each year. As a result of injuries caused by its product, to date, On-Deck has been successfully sued in Delaware, Tennessee and New Jersey.

IV.

ARGUMENT FOR DENYING WRIT OF CERTIORARI

A. The Decision of the Supreme Court of Minnesota is Consistent With Decisions of the Supreme Court of the United States.

There is no dispute that the Minnesota long-arm statute, Minn. Stat. § 543.19, confers personal jurisdiction over non-resident defendants to the fullest extent allowed by constitutional due process. *Land-O-Nod Co. v. Bassett Furniture Industries, Inc.*, 708 F.2d 1338 (8th Cir. 1983); *Vikse v. Flaby*, 316 N.W.2d 276 (Minn. 1982). Constitutional due process is satisfied and jurisdiction sustainable where sufficient "minimum contacts" exist between the defendant and the forum such that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Whether the exercise of juris-

diction is fair and reasonable depends upon "the relationship among the defendant, the forum and the litigation." *Rush v. Savchuk,* 444 U.S. 320 (1980). "Minimum contacts" exist if there is some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

The United States Supreme Court in *Shaffer v. Heitner,* 433 U.S. 186 (1977), noted that the inquiry into a state court's jurisdiction over a foreign corporation appropriately focuses not on whether the corporation was "present" in that state but on whether there have been

> such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.

433 U.S. at 203. The Court further noted that mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. . . . Thus the relationship among the defendant, the forum and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.

433 U.S. at 203-204 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

The quantity, nature and quality of contacts necessary to satisfy the due process concerns of *International Shoe* in a products liability action involving non-resident defendant corporations has received considerable attention since the now famous *dicta* of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) [1]

World-Wide Volkswagen concerned the amenability to suit in an Oklahoma state court of a small New York car dealer and an out-of-state regional distributor of automobiles. The car dealer sold vehicles at retail *only in New York*, and the distributor sold vehicles, parts and accessories *only to dealers in the states of New York, New Jersey and Connecticut*. There were no facts demonstrating any direct or indirect connection with the State of Oklahoma by these two defendants. The Court found that the distributor and retailer solicited no business in Oklahoma, availed themselves of none of the privileges and benefits of Oklahoma law, and did not "indirectly, through others, serve or seek to serve the Oklahoma market." 444 U.S. at 295. With respect to these findings, the Court held that the

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[1] *See, e.g., Bean Dredging Corp. v. Dredge Technology Corp., et al.*, 744 F.2d 1081 (5th Cir. 1984); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1278 (1984); *Hedrick v. Daiko Shoji Co., Ltd., et al*, 715 F.2d 1355 (9th Cir. 1983); *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty Ltd.*, 647 F.2d 200 (D. C. Cir. 1981); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981); *cert. denied*, 454 U.S. 1085 (1982); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); *Copie. : Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F.Supp. 312 (D. Md. 1983); *Wass v. American Safety Equip. Corp.*, 573 F.Supp. 39 (D. Me. 1983); *Papafagos v. Fiat Auto*, 568 F.Supp. 692 (D.N.H. 1983); *Lasky v. Continental Products Corp.*, 569 F.Supp. 1225 (E.D. Pa. 1983); *Rockwell Int'l Corp. v. Costruzioni Aeronatuche Giovanni Augusta*, 553 F.Supp. 328 (E.D. Pa. 1982); *Santiago v. BRS, Inc.*, 528 F.Supp. 755 (D.P.R. 1981).

mere fortuitous occurrence of an accident involving one of the defendant's vehicles in Oklahoma did not give rise to jurisdiction over the distributor and retailer in an Oklahoma state court. Because the accident fortuitously occurred in Oklahoma, the Supreme Court was obviously unable to focus on any conduct by which the two defendants availed themselves of the privilege of conducting business in Oklahoma.

The Court, however, discussed at some length those circumstances under which a non-resident manufacturer or distributor *would* be subject to personal jurisdiction by virtue of its indirect contacts with the forum:

> . . . The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, *it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there* (citations omitted). The Due Process Clause, by ensuring the "orderly administration of the laws," [citation omitted] gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> * * *
>
> When a corporation "purposefully avails itself of the privilege of conducting activities with the forum state" [citation omitted], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State. Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen *is not*

> *simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly a market for its product in other states, it is not unreasonable to subject it to suit in one of those states* if its allegedly defective merchandise has there been a source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over *a corporation that delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.* (Emphasis added)

Id. at 297-298 (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)).[3]

The decision of the Minnesota Supreme Court in this action is entirely consistent with the mandates of constitutional due process set forth by this Court in *World-Wide Volkswagen* and its progeny. As the Minnesota Supreme Court concluded:

> In short, On-Deck sold thousands of its bat-weights in Minnesota. The reason the weights were sold here is that On-Deck contracted with General Sports and other national retailers to serve the national market and, specifically, the Minnesota market. It profited thereby. This is purposeful availment by On-Deck of

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[3] Importantly, the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) (cited favorably above by the Supreme Court in *World-Wide Volkswagen)* stated:

> Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, *it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this state.*

176 N.E.2d at 766. (Emphasis added)

> the benefits and corresponding responsibilities of doing business in Minnesota. Traditional notions of fair play and substantial justice dictate that On-Deck should defend this lawsuit in Minnesota; they would be offended if these plaintiffs were limited to suit in New Jersey.

Petitioner's Appendix at A-11.

B. The Decision of the Supreme Court of Minnesota is Consistent With Decisions of the Federal Court of Appeals.

Petitioner cites three opinions of the United States Federal Court of Appeals which it states conflicts with the decision of the Supreme Court of Minnesota in this action. Each of those Federal Court of Appeals decisions is entirely distinguishable from the decision of the Supreme Court of Minnesota in this action and does not provide a basis whatsoever for the granting of certiorari in this action.

1. *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709 (8th Cir. 1984).

Humble is one of a line of decisions in which the court addresses the question of whether personal jurisdiction can be fairly and reasonably exercised over a *component parts manufacturer* who sells its parts *solely* to the manufacturer of the subject product prior to that product's entrance into the stream of commerce. In *Humble*, the Arakawa Corporation, a Japanese corporation, manufactured front and back seats for automobiles which were sold solely to the Toyota Corporation in Japan. Toyota, Japan, then sold

the finished product, its automobiles, to Toyota subsidiaries throughout the world. Toyota, USA, one of those subsidiaries, then distributed its automobiles to dealers throughout this country. The plaintiff in *Humble,* injured in a Toyota automobile, attempted to obtain personal jurisdiction over Arakawa, the Japanese component parts manufacturer, in Iowa.

The Eighth Circuit Court of Appeals, applying the very same due process standards applied by the Supreme Court of Minnesota in this action, held that the relationship between the plaintiff, the forum and the Japanese component parts manufacturer was too attenuated to fairly and reasonably exercise jurisdiction over that corporation in Iowa. It is important to note first that the *very same* legal standard was applied to the facts of *Humble.* Second, the manufacturer of the subject defective automobile, Toyota, Japan, had no direct contacts with the State of Iowa. Yet the plaintiff in *Humble* successfully exercised jurisdiction over that corporation. The due process analysis in *Humble* precisely tracks the analysis engaged in by the Minnesota Supreme Court in this action.

2. *Glater v. Eli Lilly & Co.,* 744 F.2d 213 (1st Cir. 1984).

The "stream of commerce theory" first introduced in *World-Wide Volkswagen* was not considered by the First Circuit Court of Appeals in *Glater.* The issue in *Glater* concerned the suffficiency of the *plaintiff's* contacts with the subject forum. The plaintiff in *Glater* was injured as a result of a drug ingested by her mother *in utero;* a drug which she purchased and consumed in Massachusetts. Yet, the *Glater* plaintiff sought to exercise jurisdiction over the

defendant drug manufacturer in New Hampshire. The court held that specific jurisdiction could not be exercised over the defendant because the plaintiff's injury was not caused by defendant's activities in New Hampshire but rather by defendant's activities in Massachusetts. The court refused to exercise general jurisdiction over the defendant on the grounds that the defendant did not engage in the continuous and systematic pursuit of business in New Hampshire.

Unlike in *Glater,* respondents, Minnesota residents, were injured by defendant's product in Minnesota—a product mass-marketed throughout Minnesota. The sufficiency of respondents' contacts with Minnesota is not now and never has been at issue in this matter.

3. *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert. denied*, 439 U.S. 983 (1978).

The plaintiff in *Hutson* was injured by a 3/8ths inch chain. The chain was manufactured by a corporation in Yugoslavia. The Yugoslavian corporation sold the chain to a corporation entitled Weissenfels who repackaged the chain and sold it to a British corporation. The British corporation sold the chain to a wholly-owned subsidiary in the United States. That subsidiary repackaged the chain and sold it to a retailer who sold it to the plaintiff's employer. The question in the case was whether the plaintiff could fairly and reasonably exercise *in personam* jurisdiction over Weissenfels, a distributor in the stream of commerce who merely repackaged the product and sold it solely to a British corporation.

Again, applying the very same legal analysis engaged in by the Minnesota Supreme Court in this action, the

Eighth Circuit Court of Appeals ruled that the connection between Weissenfels and the plaintiff was too attenuated to fairly support the exercise of jurisdiction over it in Arkansas. That defendant had neither manufactured the chain nor sold it to anyone in the United States. Further, that defendant had no control over the selection of customers or over other marketing decisions concerning the chain. The British corporation, defendant Fehr Bros., over which the plaintiff *did* successfully exercise jurisdiction, like On-Deck in this action, injected its product into the stream of commerce with the intent of mass-marketing it throughout the country, retained control over marketing decisions and could reasonably anticipate that its product would be sold in Arkansas.

Citing the United States Supreme Court decision in *Hanson v. Denckla, supra,* the *Hutson* court noted,

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. (Cites omitted)

584 F.2d 833, 837 (citing 357 U.S. 235, 246).

Weighing the facts in *Hutson,* the Eighth Circuit Court of Appeals concluded that the requisite "affiliating circumstances" were not present. Just as in *Hutson,* the Supreme Court of Minnesota weighed the unique facts in this case to determine whether the requisite "affiliating circumstances" were present. Clearly, the due process standard is consistently applied throughout these cases; each case differs not on the law but solely on its facts.

C. The Decision of the Supreme Court of Minnesota Is Consistent With the Decision of the Arizona Court of Appeals in *Rowell Laboratories, Inc. v. Superior Court*, 117 Ariz. 400, 573 P.2d 91 (1977).

Petitioner states on page 13 of its *Petition For Writ of Certiorari* that the Opinion of the Supreme Court of Minnesota is in conflict with the "Supreme Court of Arizona's decision in *Rowell Industries (sic), Inc. v. Superior Court*, 117 Ariz. 400, 573 P.2d 91 (1977)." First, it is important to note that the decision in *Rowell*, which is found on page 91 of the 573rd volume of the *Pacific Second Reporter*, is a decision of the *Court of Appeals of Arizona, Division 2*, and *not* a decision of the Supreme Court of Arizona. This Court should take judicial notice of the fact that the Court of Appeals of Arizona in 1977 was and remains an intermediate appellate court and not a state court of last resort.

In any event, the decision in *Rowell* is essentially similar to the decision in *Glater, supra*. The plaintiff in *Rowell* was injured as a result of a drug ingested by her mother in Ohio. Similarly, the *Rowell* court was concerned with the sufficiency of the *plaintiff's* contacts with the Arizona forum to justify the exercise of specific jurisdiction over the defendant in that forum. Once again, there is no dispute in this action that the tort occurred in Minnesota, the subject forum.

V.

CONCLUSION

Nationwide marketing of consumer products through national independent distributors has prompted this Court and other courts to formulate a standard to dictate when and whether a court can fairly and reasonably exercise jurisdiction over an out-of-state manufacturer of such products. As this Court noted in *World-Wide Volkswagen*, due process mandates that this standard lend a degree of predictability to the legal system that allows such manufacturers to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. Although this standard will protect such a manufacturer whose product reaches a forum fortuitously, courts have uniformly held that the fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of a forum's long-arm statute by using an intermediary or independent distributor. If the manufacturer intends to maximize the nationwide marketing of a consumer product, fairness and reasonableness mandate that the manufacturer be amenable to suit in a forum in which its product is mass-marketed and in a forum where that product has injured a user or consumer.

This standard, first discussed in *World-Wide Volkswagen* and later developed in case law cited above, has been uniformly applied in this action and in every case cited in petitioner's Petition for Writ of Certiorari. The due process standard is uniform, consistent and fairly applied. Whether or not jurisdiction is exercised over a subject corporation is entirely dependent upon the unique facts of each case, not upon the due process standard employed.

Accordingly, none of the grounds set forth in Rule 17.1 (b) and (c) of the Supreme Court Rules provide any basis for granting petitioner's Petition For Writ of Certiorari. Respondents Dean and Barbara Rostad respectfully pray that petitioner's Petition For Writ of Certiorari be denied.

Dated this 1st day of November, 1985.

Respectfully submitted,

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APPENDIX

EXHIBIT K

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

Dean A. and Barbara J. Rostad,

Plaintiffs,

vs.

On-Deck, Incorporated, a New Jersey corporation, and Gary Guy Willey,

Defendants.

AFFIDAVIT OF CHRIS L. OLSON

Court File No. 766532

STATE OF MINNESOTA

SS.

COUNTY OF RAMSEY

CHRIS L. OLSON, being first duly sworn on oath, deposes and says as follows:

1. That he is a Legal Assistant at Robins, Zelle, Larson & Kaplan, 1210 Minnesota Building, St. Paul, Minnesota 55101.

2. That since 1978, your Affiant has purchased On-Deck bat weights at the following retail outlets:

a. Kokesh Athletic & Golf Supply, 1001 Excelsior Avenue West, Hopkins, Minnesota.

b. Kokesh Athletic & Golf Supply, 3000 White Bear Avenue, St. Paul, Minnesota.

c. Kokesh Athletic & Golf Supply, 1917 South Robert, West St. Paul, Minnesota.

d. Steichen's Sporting Goods, 2425 Rice Street, St. Paul, Minnesota. *See attached Affidavit.

e. Sears Roebuck and Co., 425 Rice Street, St. Paul, Minnesota.

f. Sears Roebuck and Co., 8301 Flying Cloud Drive, Eden Prairie, Minnesota.

g. Sears Roebuck and Co., 12431 Wayzata Boulevard, Minnetonka, Minnesota.

h. C. R. Sports Center, 2107 Ford Parkway, Highland Park, Minnesota.

i. A & B Sporting Goods Co., 10 South Ninth Street, Minneapolis, Minnesota.

That these purchases by your Affiant are documented by the attached receipts.

3. On December 8, 1983, your Affiant was informed by Mr. J. W. Gallop, corporate sporting goods buyer for K-Mart, that until two years ago K-Mart carried On-Deck bat weights as a retail sporting goods product in all of its Minnesota stores.

4. On December 7, 1983, Mr. Gene Ronning, former distributor for General Sportcraft, informed your Affiant that he sold On-Deck batting weights between 1969 and 1980 to virtually all of the sporting good stores in the state of Minnesota. *See attached affidavit.

5. On December 8, 1983, your Affiant was informed by Mr. Ray Krump, equipment manager for the Minne-

sota Twins, that he has been buying On-Deck bat weights for use by the Minnesota Twins for at least ten years.

6. On December 7, 1983, your Affiant was informed by Mr. Neson Berman, owner and buyer of A & B Sporting Goods Co., that throughout the 1970s he had marketed thousands of On-Deck batting weights to retail customers. *See attached Affidavit.

7. That on December 8, 1983, your Affiant was informed by Mr. Robert Berens, sporting goods manager of the Ridgedale Sears Store that Sears has carried On-Deck bat weights for many years and currently carries On-Deck bat weights as a retail sporting goods item .

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Chris L. Olson

Subscribed and sworn before me this 8th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF TED STEICHEN, JR.

Steichen's Sporting Goods, 2425 Rice Street, St. Paul, Minnesota

1. I am the proprietor of Steichen's Sporting Goods located at 2425 Rice Street, St. Paul, Minnesota.

2. That for a period of about five to ten years, comprising most of the 1970s, Elston Howard On-Deck bat weights were available for sale at Steichen's Sporting Goods.

3. That during the period Elston Howard On-Deck bat weights were available for sale at Steichen's Sporting Goods, approximately 75 percent of our sales of this product were to baseball teams and approximately 25 percent of our sales of this product were to softball teams.

4. That the sales by Steichen's Sporting Goods of the Elston Howard On-Deck bat weights were primarily made to highschools.

/s/ Ted Steichen, Jr.

Subscribed and sworn before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF EUGENE RONNING

1. I live at 4615 Folwell Drive South, Minneapolis, Minnesota.

2. Between the mid 1950s and 1980, I was a field representative for General Sportcraft, a distributor of sporting goods.

3. Beginning with the 1969 edition of the General Sportcraft catalog, On Deck bat weights were available to all of my Minnesota customers.

4. Between the years 1969 and 1980, I sold On Deck bat weights throughout the state of Minnesota to sporting goods retail stores.

5. Between the years 1969 and 1980, I sold several thousands of these On Deck bat weights to retail sporting goods stores in the state of Minnesota.

6. My sales area was Minnesota, N and S. Dakota, parts of Wisconsin and Iowa.

/s/ Eugene Ronning

Subscribed and sworn to before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF NESON BERMAN

A & B Sporting Goods, 10 South Ninth Street, Minneapolis, MN

1. I have been employed at A & B Sporting Goods since 1967.

2. My position is that of buyer.

3. Throughout the 1970s A & B bought On Deck bat weights from General Sportcraft.

4. The On Deck bat weights were always packaged in a box designated "Elston Howard's On-Deck Bat-Weight, distributed by General Sportcraft Co., Ltd., Bergenfield, N.J.", the same as that attached as Exhibit A.

5. All On Deck bat weights we obtained for sale to the public were purchased from General Sportcraft.

6. During the 1970s we sold thousands of these bat weights.

7. We ceased to carry the item in or around 1980 due to the fact that the bat weight was outlawed by Minnesota Little League organizations and softball leagues.

/s/ Neson Berman

Subscribed and sworn to before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

EXHIBIT L

THIS AGREEMENT, made the 10th day of September, 1968 by and between ON-DECK, INC., a New Jersey corporation having a place of business in the Borough of Englewood Cliffs, Bergen County, New Jersey, hereinafter called "SELLER", and GENERAL SPORTCRAFT CO., LTD., a New York corporation authorized to do business in the State of New Jersey having a place of business in the Borough of Bergenfield, Bergen County, New Jersey, hereinafter called the "PURCHASER", and ELSTON G. HOWARD, residing in the Township of Teaneck, Bergen County, New Jersey.

WITNESSETH:

WHEREAS, the SELLER is the exclusive licensee for the territory of North America, State of Hawaii and all of the Islands in the Caribbean Sea and the Gulf of Mexico, of an article of manufacture, hereinafter called a "Bat-Weight", which article of manufacture is the subject of a United States patent application filed by Frank G. Hamilton as inventor and entitled "Weight for a Baseball Bat", and

WHEREAS, the PURCHASER is desirous of purchasing said Bat-Weights from the SELLER and reselling and distributing said product throughout the continent of

North America, the state of Hawaii, and all islands in the Caribbean Sea and the Gulf of Mexico, and

WHEREAS, ELSTON G. HOWARD is a well-known baseball "personality" who is also the president of the SELLER.

NOW THEREFORE, in consideration of the mutual covenants and agreements and representations of the parties herein contained it is agreed by and among them as follows:

1. The SELLER represents that it has been granted by the owner of the aforesaid patent application filed by Frank G. Hamilton as inventor and entitled "Weight for a Baseball Bat", the right to manufacture, sell and distribute the article of manufacture described in the aforesaid United States patent application, and the SELLER furthermore represents that it has the right under the aforesaid grant to grant to the PURCHASER and provided the PURCHASER substantially abides by the provisions of this Agreement, does hereby grant to the PURCHASER the exclusive right to sell and distribute said Bat-Weights throughout the continent of North America, the state of Hawaii, and the islands located in the Caribbean Sea and the Gulf of Mexico, and to any agency of the United States Government including military exchanges notwithstanding that the product shall actually be used outside of the exclusive sales area of the PURCHASER. The PURCHASER agrees that notwithstanding the foregoing, the SELLER shall have the right to sell said Bat-Weights to the organized major league baseball teams, commonly known as the National and American Leagues, and to the individual members thereof and to individual players on said baseball teams solely for use by said leagues, teams or

players and not for the purpose of resale. The PURCHASER shall not have the right to sell said Bat-Weight in any geographic area in which it does not have the exclusive right to sell same.

2. Beginning January 1, 1969 the SELLER agrees to sell and the PURCHASER agrees to purchase a minimum of 5,000 Bat-Weights per month for delivery to the PURCHASER to and inclusive of October 31, 1969. The SELLER agrees to sell to the PURCHASER such additional Bat-Weights as it may require in excess of said minimum purchases. It is understood that it is the intention of the parties that the PURCHASER shall purchase Bat-Weights to be delivered in monthly installments in the year 1969 up to and including October 31st thereof.

The SELLER shall manufacture Bat-Weights of three sizes:

(a) Small Bat-Weights weighing approximately one pound and having a blue coating:

(b) Medium Bat-Weights weighing approximately 1 1/2 pounds and having an orange coating; and

(c) Large Bat-Weights weighing approximately 1 3/4 pounds and having a red coating.

The PURCHASER shall designate the proportion of small, medium and large Bat-Weights to be supplied to it by the SELLER. [contract not legible] . . .
weights for medium Bat-Weights; $1.48 per weight for large Bat-Weights, $1.89 per weight. The above prices shall be FOB, point of warehousing or packaging to be selected by PURCHASER within 25 miles of Bergenfield, New Jersey. The PURCHASER shall be responsible

for excess freight only in the event it selects a point of warehousing or packaging further from Bergenfield, New Jersey than 25 miles. The above price shall remain in effect for all orders for delivery prior to December 31, 1969. In addition to the above price, the PURCHASER shall be entitled to a 1% cash discount for payment within 30 days after deliverf, net 60 days. [contract not legible] . . . packaged in individual packages or in bulk. All individual packages shall have the following legend prominently displayed: "Elston Howard's On-Deck Bat-Weight".

5. The SELLER agrees to ship to the PURCHASER the Bat-Weights ordered by the PURCHASER 90 days after the date of the receipt [of] an order or within a reasonable time thereafter using due diligence unless said order permits later delivery. The PURCHASER shall pay for said [contract not legible . . .]
The SELLER agrees to supply such additional Bat-Weights in excess of the minimum number to be purchased by the PURCHASER pursuant to this agreement, as may be required by the PURCHASER in accordance with the terms of this agreement.

6. The SELLER shall be responsible for the promotion of said Bat-Weights among the professional baseball teams in the United States, Canada and Mexico. HOWARD agrees to make personal appearances at sporting shows, retail stores, and other promotionally advantageous appearances at the written request of the PURCHASER in order to promote the sale of said Bat-Weights, provided that said appearances do not interfere with HOWARD'S occupation as a baseball player or otherwise interfere with prior commitments made by him, and further

provided that the reasonable travel and living expenses of ELSTON HOWARD are provided by the PURCHASER or other sponsor of the appearance. Where the travel and living expenses are provided to HOWARD by his baseball employer or otherwise, additional payments on account thereof shall not be required by the PURCHASER.

The PURCHASER agrees to use all reasonable diligence in the promotion and sale and distribution of said Bat-Weights to retailers or other [contract not legible] . . . contracted by it or its agents in and by the sale of said Bat-Weights and all costs and expenses of advertising the same and selling and distributing the same, except as may otherwise be provided in this agreement.

7. During the period of this agreement, the PURCHASER shall not manufacture, sell, or distribute, either directly or indirectly, any device similar to the said Bat-Weights without the prior written consent of the SELLER. This agreement is intended to include the existing and any new models of Bat-Weights. In the event new models of Bat-Weights are developed and produced, this agreement shall apply in full force and effect to the same. The price of said new models shall be determined by agreement of the parties. In the event they are unable to reach agreement, the price shall be determined by arbitration pursuant to the rules then applying of the American Arbitration Association which shall select a price which shall provide for the SELLER [a] profit percentage equal to that of the Bat-Weights set forth in this agreement.

8. During the term of this Agreement and any extensions thereof, in the event the representations contained herein with respect to the exclusive right of the SELLER to

manufacture, sell and distribute the aforesaid Bat-Weights are not complete and correct or in the event said patent application is officially rejected in its entirety without further right of appeal or in the event the SELLER'S rights with respect to the said patent are infringed by any other person and the SELLER does not secure the immediate enforcement of said rights, the PURCHASER shall have the option to terminate this Agreement and return for full credit at the SELLER'S expense all Bat-Weights in its possession. The right of the PURCHASER to terminate this Agreement and to return for full credit at the SELLER'S expense all unsold Bat-Weights in its possession, shall also apply in the event said patent is declared substantially invalid after issue by any Court of competent jurisdiction without further right of appeal, if any, being exercised, or in the event the SELLER or the Owner of said patent fails to protect said patent after issue from infringement by any third persons. In the event the SELLER shall actively interfere with the PURCHASER'S exclusive rights to sell and distribute said Bat-Weights within its franchised area or in the event the SELLER shall to the extent of its authority to do so, fail to actively prevent the sale or distribution within the PURCHASER'S exclusive area of sale of Bat-Weights by any other person for any reason, the PURCHASER shall have the right to terminate this agreement and to return for full credit at the SELLER'S expense any unsold Bat-Weights in its possession. The obligation of the SELLER under this agreement to accept and repay for said unsold Bat-Weights shall be personally guaranteed by Frank G. Hamilton, Elston Howard and Vincent Salvucci and shall include costs of packaging, freight and handling.

9. In the event the SELLER shall fail to deliver the products within the time required by this agreement, the PURCHASER on 5 days written notice to the SELLER, shall have the right, without cancelling any other provision of this agreement, to arrange for the manufacture of such Bat-Weights as the SELLER shall fail to deliver by others or by the PURCHASER, in which event the SELLER shall be responsible for any damage suffered by the PURCHASER and in which event the PURCHASER shall pay to the SELLER the difference between the cost to it of the product pursuant to the provisions of this paragraph and the cost it would have paid to the SELLER pursuant to paragraph 3 of this agreement. The PURCHASER shall provide the SELLER a certified audit with respect to its costs of manufacturing this product and the number of units manufactured by the PURCHASER.

10. This agreement, including the prices for the Bat-Weights and the minimum purchase requirement of the PURCHASER, shall continue from year to year unless either party shall notify the other of the termination of the agreement in writing on or before the 31st day of October of the preceding year.

In the event the agreement is terminated by the SELLER pursuant to the provisions of this paragraph, the SELLER shall, at the option of the PURCHASER, repurchase from the PURCHASER all unsold Bat-Weights at the price paid therefor by the PURCHASER plus its costs of packaging and freight.

In the event the agreement is terminated by the PURCHASER pursuant to the provisions of this agreement at the option of either the SELLER or the PURCHASER

the SELLER shall repurchase from the PURCHASER all unsold Bat-Weights at the price paid therefor by the PURCHASER plus its costs of packaging. In no event shall the SELLER be required to re-purchase more than 25,000 units.

11. PURCHASER agrees to pay for all Bat-Weights previously ordered and received by the PURCHASER which have not as yet been paid for in the following manner:

(a) 10 days after the signing of this agreement: $3,021.68

(b) 20 days after the signing of this agreement: $10,371.70

12. If the PURCHASER shall become bankrupt or insolvent and/or if the business of the PURCHASER shall be placed in the hands of a Receiver, Assignee, or Trustee, whether by the voluntary act of the PURCHASER or otherwise, this agreement shall immediately terminate and without notice.

13. Upon any breach or default under this agreement by the PURCHASER, the SELLER may terminate this agreement by thirty (30) days' written notice given to the PURCHASER. Said notice and termination shall become effective at the end of said period, unless during said period the PURCHASER shall cure such breach or default. Upon such termination the SELLER shall have the option of repurchasing from the PURCHASER all the unsold Bat-Weights at the price paid therefor by the PURCHASER.

14. Upon the issuance of Letters Patent, either in the United States of America, or elsewhere, all packages for the article of manufacture covered by this agreement, both individual and bulk packages, shall be plainly marked with the Patent Numbers of the Letters Patents, as directed by the patent counsel for the SELLER. Any patent marking on the Bat-Weights themselves shall be done by the SELLER and any patent marking on the packaging thereof shall be done by the PURCHASER but only with respect to packages printed after notification of the issuance of the patent is received by the PURCHASER.

15. Any change in the individual packages for the Bat-Weights which differ from the packages currently being used by the PURCHASER shall first be approved in writing by the SELLER. In the event the PURCHASER desires to change the individual packages for the Bat-Weights currently in use it shall supply a sketch of such a change to the SELLER which change shall be deemed approved unless within ten (10) days of its submission to the SELLER the SELLER shall advise the PURCHASER in writing of its disapproval. The SELLER shall not unreasonably withhold its consent to any change. In the event the SELLER desires a change in the packaging it shall submit the same to the PURCHASER who shall not unreasonably disapprove of same—provided such change does not increase the cost of packaging to the PURCHASER.

16. The provisions of this agreement shall not be assigned without the written consent of the parties hereto, but shall otherwise be binding upon the heirs and successors of the parties hereto.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the day and year first above written.

ATTEST:

/s/ Frank G. Hamilton
Frank G. Hamilton, Sec.

ATTEST:
/s/ James J. Miceli
James J. Miceli, Vice Pres.

As to Guarantee:
/s/ Elston Howard
Elston Howard

/s/ Frank G. Hamilton
Frank G. Hamilton

/s/ Vincent Salvucci
Vincent Salvucci

ON-DECK, INC.
/s/ Elston Howard
Elston Howard, President
GENERAL SPORTCRAFT CO., LTD.
/s/ Kenneth J. Edelson,
Kenneth J. Edelson, Vice Pr.
/s/ Elston Howard
Elston Howard

Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-594

IN THE

Supreme Court of the United States

October Term, 1985

ON-DECK, INC., a New Jersey corporation,

Petitioner,

vs.

DEAN A. and BARBARA J. ROSTAD, GARY GUY WILLEY, and GENERAL SPORTCRAFT, INC., a corporation,

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

I. THE QUESTION PRESENTED FOR REVIEW BY RESPONDENTS FAILS TO RECOGNIZE TWO CRUCIAL ASPECTS OF THE CASE.

First, it fails to acknowledge the undisputed fact that there is no evidence that the product involved in this accident reached the State of Minnesota in the stream of commerce. Second, it fails to acknowledge the undisputed fact that the independent distributor of petitioner's product was under no contractual or other obligation to distribute petitioner's product in any particular state, including the State of Minnesota.

The decision to market the product in the State of Minnesota was a decision that rested entirely with respondent, General Sportcraft. Thus, there was a "purposeful availment" of the State of Minnesota by the distributor, but not by the petitioner.

II. PETITIONER'S ALLEGED NATIONAL AND INTERNATIONAL MARKETING SCHEME DID NOT INCLUDE CONDUCT WITHIN THE STATE OF MINNESOTA.

Respondents cite the fact that officers of petitioner's corporation went on promotional trips "throughout the United States". Respondents ignore, however, that there is not a shred of evidence that *any* of the promotional trips took place in the State of Minnesota.

III. THE ATTEMPT BY RESPONDENTS TO DISTINGUISH CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES FROM THE DECISION OF THE SUPREME COURT OF MINNESOTA IS UNPERSUASIVE.

The respondents cite and quote from *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286 (1980) as not inconsistent with the decision of the Supreme Court of Minnesota. Here, however, as in *World-Wide Volkswagon*, petitioner did not seek indirectly to serve the Minnesota market, but left the decision as to whether to serve it or not entirely in the discretion of the independent national distributor. The fact that some products—although not the product involved in this accident—found their way into the forum jurisdiction was

foreseeable but was also fortuitous and *not the result of a purposeful availment of the Minnesota jurisdiction by petitioner.* The fortuitousness of the events giving rise to the present litigation is two-fold: (1) there is not a scintilla of evidence that the product causing the injury entered Minnesota in the stream of commerce; (2) the fact that respondent, General Sportcraft, without any legal duty to serve the forum jurisdiction, chose to serve the Minnesota market by introducing other products not involved in this litigation into the forum jurisdiction.

The respondents' quotation from *World-Wide Volkswagon* on page 9 of their brief, rather than being helpful to their position, actually detracts from it. Pursuant to the analysis contained in that quotation, it is arguable that On-Deck might have *foreseen* the likelihood that some of its products would find their way into the State of Minnesota, but there is a total void of any conduct in or connection with the forum state by which On-Deck should have reasonably anticipated being haled into court there. Any such anticipation rests with the distributor, which alone had contacts with the State of Minnesota.

Similarly, the quote from *World-Wide Volkswagon* on pages 9 and 10 of their brief falls short of the mark for the same two reasons: (1) there is no evidence that the product causing the injury entered Minnesota in the stream of commerce; (2) there was no *expectation* by On-Deck that the product would be sold in Minnesota; only the chance that the distributor might elect to sell it there.

Finally, the quote from the Minnesota Supreme Court decision on page 10 of respondents' brief that On-Deck contracted with General Sportcraft and other national retailers to serve . . . specifically, the Minnesota market, is devoid of any support in the record.

IV. THE DISTINCTIONS THAT RESPONDENTS ATTEMPT TO MAKE TO FEDERAL COURT OF APPEALS DECISIONS ARE WITHOUT MERIT.

In *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709 (8th Cir. 1984), the Eighth Circuit opinion quotes with approval the trial court's conclusion that there was no doubt that the dismissed defendant, Arakawa, could have *foreseen that its product would find its way into the United States and into the State of Iowa.* Arakawa could not have anticipated being haled into Court in Iowa, however, since there was a total lack of contact between Arakawa and the State of Iowa. In similar fashion, petitioner, On-Deck, did not conduct any activities in the State of Minnesota by which it could anticipate being haled into court there. There is simply no valid distinction between placing a component part in the stream of commerce and placing a finished product in the stream of commerce. Here, On-Deck placed other products, not involved in this litigation, in the stream of commerce, but took no direct or indirect effort specifically to serve the Minnesota market. Although it could *foresee* that its products might find their way into Minnesota, it took no specific steps to serve that market.

The respondents' attempted distinction of *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984) is not persuasive. In *Glater*, the court found that none of the *direct* contacts of the defendant with the State of New Hampshire were causally related to plaintiff's injury. Similarly, in the present case, none of the petitioner's alleged *indirect* contacts with the State of Minnesota are causally related to respondents' injury. Likewise, in *Glater*, none of the admitted direct contacts of

Eli Lilly & Company with New Hampshire were causally related to plaintiff's alleged injury in another state. The language of the *Glater* court is instructive on the issue now before the Court, as follows:

> "Where a defendant has certain judicially cognizable ties to the forum state, 'a variety of factors relating to the particular cause of action may be relevant' to the issue of jurisdiction. (Citation omitted). *A consideration of fundamental importance is whether the cause of action arises out of or is related to the defendant's contacts with the forum state.* If so, then 'specific jurisdiction' may be found based on the relationship among the defendant, the forum, and the litigation. (Citations omitted). If, on the other hand, the cause of action is unrelated to the defendant's interstate activities, the issue becomes one of 'general' rather than 'specific' jurisdiction. (citation omitted). *Although minimum contacts suffice in and of themselves for specific jurisdiction under International Shoe, the standard for general jurisdiction is considerably more stringent.* (Citations omitted). The importance of the distinction is illustrated in the present case. (Emphasis supplied) 744 F.2d 213, 215-216.

Here, unlike *Glater*, there were *no direct contacts* by On-Deck with the forum state which even arguably would permit exercise of general jurisdiction over On-Deck. Specific jurisdiction is lacking, even though the accident occurred in the forum state, because the offending product did not enter the forum jurisdiction either directly or indirectly in the stream of commerce.

The respondents' attempted distinction of *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert. denied*, 439 U.S.

983 (1978) falls completely short of the mark. There, the Italian corporation, which was dismissed because of lack of *in personam* jurisdiction, had sold the allegedly defective chain to a British distributor which was given the exclusive right to sell the product throughout North America. Thus, it was *foreseeable* that the chain might find its way into the State of Arkansas, which undeniably is within North America. Since the chain actually reached the State of Arkansas *in the stream of commerce* and since this was undeniably foreseeable by the Italian corporation, the dissenters argued that jurisdiction should be entertained. Notwithstanding this foreseeability, however, the majority ruled against jurisdiction, finding no direct contacts between the Italian corporation and the State of Arkansas.

The case now before the Court argues more strongly against exercise of *in personam* jurisdiction, since in this case, the allegedly offending product was not shown to enter the State of Minnesota in the stream of commerce, whereas, in *Hutson*, there was no dispute that the product had entered the State of Arkansas in the stream of commerce. Otherwise, the two cases are exactly the same in that in each case there was a grant of an exclusive distributorship for the North American continent, but no obligation on the part of the independent distributor to market the products in any specific state, nor any obligation to market the product in the forum state.

V. CONCLUSION

The exercise of *in personam* jurisdiction over petitioner by the State of Minnesota violates due process for the following reasons:

(1) There were *no direct contacts* between petitioner and the forum jurisdiction;

(2) there is no evidence that the product causing injury found its way into the forum jurisdiction in the stream of commerce, either direct or indirect;

(3) other products, not involved in this litigation, reached the forum jurisdiction in the stream of commerce, *but not because petitioner made any purposeful availment* of the forum jurisdiction;

(4) the only purposeful availment of the forum jurisdiction was by respondent, General Sportcraft.

Petitioner, On-Deck, Inc., again respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Minnesota filed on August 16, 1985.

Respectfully submitted,

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